Public Knowledge

January 4, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56

Dear Ms. Dortch:

Today, Gigi Sohn and John Bergmayer of Public Knowledge (PK) had a telephone conversation with Dave Grimaldi, Chief of Staff and Media Legal Advisor to Commissioner Clyburn, about the proposed merger between Comcast and NBC.

While reiterating its opposition to the proposed merger, PK suggested that if the Commission approves it, both the FCC (in addition to the Department of Justice) should retain oversight to ensure compliance with any conditions or commitments. Similar to the procedures recently adopted in the Commission's Open Internet order, *see* Preserving the Open Internet, *Report & Order*, FCC 10-201 (Dec. 23, 2010) at ¶ 158, it should give accelerated treatment pursuant to 47 C.F.R. §§ 1.730 and § 1.3 to any complaints that are filed alleging a violation of any of the conditions of the merger, or any other program carriage or access disputes.

On the topic of online video access, PK stressed that a "comparative" regime where the combined company would be judged according to the behavior of non-integrated programmers, even if it worked, would not meet the Commission's statutory requirement to ensure that the merger *promotes* the public interest. *See* Applications for Consent to the Assignment and/or Transfer of Control of Licenses, *Memorandum Opinion & Order*, 21 FCC Rcd 8203, ¶ 4 (2006). At most, such a condition could make an aspect of the merger competitively neutral, which is not enough. But more importantly, such a condition could not work. The combined company would be so large that its behavior would affect the behavior of all other marker participants—thus creating a circular situation where the combined company is held to the standards of "the industry," which in turn are set or affected by the new combined company, its largest and most important participant. Rather than such an ineffective condition, PK reiterated its support for an affirmative obligation on the combined company to make programming available to online competitors, similar to how it (by law) must make programming available to MVPD competitors. Quite simply, the FCC must not abdicate its responsibility to promote the public interest in favor of the kind of antitrust-centered analysis that is the province of the DOJ.

PK also argued that, if the Commission allows the proposed merger to go forward, the combined company should be prohibited from restricting the ability of third-party and independent programmers from doing business with the combined company's competitors, or from making their programming available online. To that end, PK again suggested that it is important for programming contracts between Comcast and independent programmers to be made part of the confidential record. There is already evidence that these contracts tend to restrict programmers' ability to make deals with Comcast's competitors. But such restrictions can take many forms, direct and indirect. For example, Comcast might include windowing

provisions, or requirements that any content made available online be accessible only to viewers that have "authenticated" that they also have an MVPD subscription. In order to adequately craft conditions that address the various forms these restrictions can take, the Commission will need to refer to specific contractual language. Furthermore, to the extent that the Commission does make such contracts part of the basis for its decision—even if it decides *not* to address their implications—it is legally obligated to make those contracts part of the record. *See* 5 U.S.C. § 556(e). Finally, PK argued that EarthLink's proposed broadband wholesale conditions are in the public interest.

Respectfully submitted,

/s John Bergmayer
Staff Attorney
Public Knowledge